

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002**

**(202) 565-5330  
(202) 565-5325 (FAX)**



DATE: November 12, 1999  
CASE NO.: 1997 - INA - 325

In the Matter of:

SUSAN O'NEAL,  
Employer

on behalf of

ROSA E. CONTRERAS,  
Alien

Appearances: James L. Rosenberg, Esq.  
Santa Ana, California  
For Employer and Alien

Certifying Officer: Rebecca Marsh Day  
San Francisco, California

Before: Holmes, Lawson, and Wood  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Rosa E. Contreras ("Alien") filed by Employer Susan O'Neal ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On February 27, 1995, Employer filed an application for labor certification to enable the Alien to fill the position of Domestic Cook in her home in Newhall, California. (AF 37). Employer has apparently since relocated to Stevenson Ranch, California.

The duties of the job offered were described as follows:

"The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken dishes according to my instructions and supervision. Will plan menus and order foodstuffs. Will serve meals (lunch/dinner) for family of five and various guests. Will clean up after the meals including the kitchen area (floors, pots, pans) under my supervision. Will determine how many will be at each meal in order to properly plan the menu."

No education and two years of experience in the job were required. The sole special requirement was "Personal References Required." The listed work schedule was Monday through Friday from 9:00 am to 6:00 p.m. Wages were \$12.17 per hour. (AF 37).

A mandatory advertisement was placed in the *Los Angeles Times (Valley Edition)* for three consecutive days, but produced no applicants. No posting was made on the premises of Employer because there were no employees at that location. The job service also failed to refer any applicants. (AF 45).

On March 26, 1996, the (Acting) CO issued an NOF proposing to deny certification, finding that there was no bona fide job available and that the job was not clearly full-time, violating the definition of "employment" in the regulations. The Employer could correct the deficiencies by presenting documentation of (summarized): who previously performed cooking duties, number of meals and who they were for, entertaining needs and history, duties of the employee, schedules of children and parents, and who will perform other household duties. The NOF also specified that, in violation of 20 C.F.R. § 656.20(c)(1), the Employer had not shown an ability to pay the salary. The CO required proof of income. (AF 31-35).

A rebuttal was filed on May 15, 1996 by the Employer, after requesting and receiving an extension of time in order to obtain tax records. The substance of the rebuttal was six pages long,

and consisted of a 3 page letter with point-by-point statements responding to each of the CO's documentation requests, Employer's tax return from 1995, and a one page daily work schedule for the Alien which noted duties such as "cook," "bake," "clean," "plan menus" and the time expected for each task. Each day listed eight hours of work, five days per week, with three meals being prepared each day. (AF 12-17).

The CO found that the rebuttal submitted by the Employer failed to adequately document compliance with 20 C.F.R. § 656, and entered a Final Determination ("FD") on July 24, 1996 denying certification. The CO once again found that the existence of bona fide full time employment had not been proven, nor had an ability to pay the anticipated wage been shown. The FD did not discuss the insufficiency of funds argument in any detail; it was merely mentioned in a heading and incorporated by reference to the NOF. Consequently, it is unclear whether Employer's rebuttal on that point was adequate or not.

Employer made a Request for Reconsideration on July 31, 1996, but this was denied by the CO on October 8, 1996, on the grounds that reconsideration will only be granted with respect to issues which could not have been addressed in rebuttal. The CO relied upon *Harry Tancredi*, 1988-INA-441 (1988) as authority to that effect.

### Discussion

#### 20 C.F.R. § 656.20(c)(1): Available Funds

As mentioned above, it is unclear what role the Employer's ability to pay the stated wage played in the CO's Final Determination. When the CO fails to respond to Employer's rebuttal, the matters are deemed to be successfully rebutted. *Barbara Harris*, 1988-INA-32 (Apr. 5, 1989); *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991). In this case, Employer presented a tax return from 1995 which shows a good, though not spectacular, income. We make no finding as to the ability of Employer to pay the annual wage of \$25,313.60 out of that income.<sup>1</sup> Instead, we find that the CO's failure to address the issue fully has removed it from the Panel's consideration.

#### 20 C.F.R. §§ 656.3 and 656.20(c)(8): Bona Fide Full-Time Employment

The CO made a finding that the job is not a bona fide job opportunity. This decision was based almost entirely on a finding of a lack of full time employment. *Uy*, 1997-INA-304, (1999)(*en banc*) holds that the proper test for a bona fide opportunity is a "totality of circumstances" test. As detailed in *Uy*, such a test would consider not only hours worked, but the standards of the area, ability of employer to pay the wage, performance of non-cooking functions, presence of other workers, past hiring of domestic cooks, and the alien's training and experience. This is not an exhaustive list, but presents general guidelines for the type of evidence which

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<sup>1</sup>(Hourly wage) x (40 hours per week) x (52 weeks per year)= \$12.17 x 40 x 52= \$25,313.60. Obviously this assumes that any vacation time would be at full pay.

should be considered.

The CO, in the NOF of 3/26/96, requested documentation of evidence very much in line with the *Uy* guidelines. However, *Uy* was decided on March 3, 1999, three years after the NOF and FD in this case, and set forth a clearer standard and test to be applied to domestic cook cases. The CO must re-examine the application in light of this to ensure that all parties are fully and fairly given notice of the status and requirements as viewed by the Board and this Panel. An NOF must be clear and provide adequate notice to an employer of regulatory violations. *Uy*, 1999-INA-304 (1999)(*en banc*). Although the NOF in this case arguably gave such notice, it was issued under the prior standard, and the CO did not have the benefit of *Uy*'s clarification, nor did the Employer or Alien in formulating their rebuttal. An opportunity to make use of that benefit must be provided.

### **Order**

Therefore, the application for labor certification of Ms. Contreras is **REMANDED** to the Certifying Officer for consideration and action consistent with the *Uy* standard.

For the Panel:

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John C. Holmes  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk**

**Office of Administrative Law Judges  
Board of Alien labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.